Rules of the High Court. In any event this affidavit is a bare denial against the allegations made against the third defendant. It has not disclosed any arguable case.

The first, third and fourth defendants filed a statement of defence on July 7, 1984. Here again, the defence is a bare denial of the allegations made by the plaintiff. There is absolutely no issue raised in the defence for trial.

The second and fifth defendants filed an affidavit affirmed on December 31, 1984. This affidavit, too, is a bare denial of the plaintiffs allegations: they denied having infringed the plaintiff's trade mark, they denied manufacturing counterfeit watches. Attached to this affidavit is a draft statement of defence by the second and fifth defendants. Here again the statement of defence contains a bare denial.

From the affidavits and the statement of defence filed by the defendants, they have not disclosed any triable issued at all. Their defence is a bare denial without giving any particulars at all. See *John Wallingford's* case *(supra).*

In the circumstances, I allow the plaintiff's application for final judgment under Order 14 against the first, second, third, fourth and fifth defendants for:

(1) an injunction to restrain the said defendants and each of them whether acting by themselves, their partners or proprietors, servants or agents or otherwise howsoever from infringing the plaintiff's registered trade mark No. M/B 41437;

(2) for the delivery up or destruction upon oath of all goods and articles in the possession, power, custody or control of each of the defendants, the manufacture, use or sale of which by any of the defendants would offend against the foregoing injunction;

(3) that an enquiry be made as to what damages (if any) have been sustained by the plaintiff by reason of the wrongful acts by each of the five defendants and payment to the plaintiff of all sums found due upon taking such enquiry; and

(4) the defendants will pay to the plaintiff costs of this action and of this application.

Order accordingly.

Solicitors: *Skrine & Company; Saran Singh Co., Kwok & Company.*

LEE KIM LUANG v. LEE SHIAH YEE

[O.C.J. (K.C. Vohrah J.) June 1, 1987]

[Temerloh — Civil Suit No. 13 of 1985]

Civil Procedure – Fraud – Pleadings – Mere allegations of fraud insufficient – Particulars of fraud must be pleaded – Standard of proof higher than that in civil action – Onus to prove on person claiming fraud – R.H.C. 1980, O.18 r.12.

Land Law – Transfer of land to "Lee Yeak" – Identity of "Lee Yeak" in dispute – Fraud – Mere allegations of fraud insufficient – Standard of proof higher than in civil action – Onus to prove on person claiming fraud.

Evidence – Dispute as to identity – Inscription on tombstone admissible to show "the existence of any relationship by blood, marriage or adoption between deceased persons" – Evidence Act 1950, s.32(f).

In 1924, two plots of land, now amalgamated, were transferred to one "Lee Yeak." The transferor in both cases was Goh Ching. One of the main questions was whether she transferred both the lots to her husband, Lee Chan, or to their son, Lee Teow Kee. Goh Ching, her husband Lee Chan and their son Lee Teow Kee are now dead.

The plaintiff claimed that Lee Chan was known as "Lee Yeak" or "Lee Aik" and that the amalgamated property was therefore Lee Chan's. The defendant, however, disputed that and claimed that Lee Teow Kee, his father, was known as "Lee Yeak" or "Lee Aik."

Lee Chan died intestate in 1931. When letters of administration in respect of this estate were granted to his widow Goh Ching and their son Lee Teow Kee, this amalgamated property did not appear in the list as one of the assets of Lee Chan's estate.

In 1952 Lee Teow Kee died. The land was instead included as an asset of his estate.

The plaintiff, one of Lee Chan's sons, asserted that the said property was Lee Chan's. The plaintiff alleged fraud on the part of the defendant, one of Lee Teow Kee's sons, and sued him in his capacity as administrator of the estate of Lee Teow Kee. The defendant denied the allegation of fraud. The plaintiff relied, *inter alia*, on the inscription on his father's tombstone in Chinese characters which read "Lee Jit Chan alias Lee Chin Aik." The question before the court was whether the statement relating to the alias is a statement of a relevant fact relating to "the existence of any relationship by blood, marriage or adoption between deceased persons" within the meaning of section 32(f) of the Evidence Act 1950.

Held, dismissing the plaintiff's claim: (1) the inscription on the tombstone relating to the alias is admissible. But it only shows that Lee Chan had an alias of "Lee Chin Aik" not "Lee Aik";

(2) in this case there was merely a general allegation of fraud and the pleadings stand mute as to the circumstances relied upon as constituting the alleged fraud. A general allegation of fraud is insufficient even to amount to an averment of fraud of which any court ought to take notice;

(3) it is settled law that a higher standard of proof is required where fraud is alleged than that required for proving ordinary matters in a civil action;

(4) the law is that he who alleges fraud must clearly and distinctly prove it;

(5) in this case, no fraud had been proved and there was no proof that the disputed land belonged to Lee Chan.

Cases referred to:

(1) *Chuah Hooi Gnoh Neoh* v. *Khaw Sim Bee* A.I.R. 1915 P.C. 45.
(2) *Yap Tham Thai* v. *Low Hup Neo* 1 F.M.S.L.R. 383, 402.
(3) *Wallinford* v. *Mutual Society* (1880) 5 App. Cas. 685.
(4) *Bater* v. *Bater* [1951] P. 35.
(5) *Netherlands Trading Society* v. *Koh Kim Guan* [1959] M.L.J. 173.

CIVIL SUIT.

Ms. P.H. Yeo for the plaintiff.
Edmund Yeong for the defendant.

Cur. Adv. Vult.

K.C. Vohrah J.: This suit was filed in the High Court in Kuala Lumpur in 1979 and on the application of the plaintiff was transferred to the Temerloh High Court where it was registered in 1985.

Slightly more than six decades ago, in 1924, two plots of land, now amalgamated into one, were transferred to one "Lee Yeak." The transferor in both cases was Goh Ching. One of the main questions now is whether she transferred both the lots to her husband, Lee Chan, or to their son, Lee Teow Kee.

Goh Ching is now dead. And so too are her husband Lee Chan and their son Lee Teow Kee. The plaintiff asserts that Lee Chan was known as "Lee Yeak" or "Lee Aik" and that the amalgamated property was therefore Lee Chan's. The defendant disputes that and says that Lee Teow Kee, his father, was known as "Lee Yeak" or "Lee Aik."

Lee Chan died intestate in 1931. When letters of administration in respect of this estate were granted to his widow Goh Ching and their son Lee Teow Kee, this amalgamated property, EMR 1315, Lot 1522 in the Mukim of Mentakab, District of Temerloh, did not appear in the list as one of the assets of Lee Chan's estate.

In respect of this the plaintiff pleads in paragraph 5 of his Statement of Claim, "For reasons unknown to the plaintiff, the said land was not included in the list of assets of the estate of the said Lee Chan, deceased." It will be noted that no fraud was pleaded in relation to the administrators, Goh Ching or Lee Teow Kee. And in this context it is to be remembered that Goh Ching who co-administered the estate of Lee Chan was the person who transferred the disputed land in 1924.

In 1952 Lee Teow Kee died. And this land, EMR 1315 Lot 1522, was instead included as an asset of his estate.

The plaintiff, one of the sons of Lee Chan, asserts that the said property was Lee Chan's. While he does not allege fraud on the part of Lee Teow Kee he alleges fraud on the part of the defendant, one of the sons of Lee Teow Kee, and sues him in his capacity as administrator of the estate of Lee Teow Kee.

The petition for Grant of Letters of Administration in respect of Lee Teow Kee's estate was made on April 27, 1953. The plaintiff, however, filed this suit some 26½ years later on October 27, 1979 in the Kuala Lumpur High Court and alleges in paragraph 11 of his Statement of Claim that he was away from the country from 1949 when he left for China for further education until he was permitted to enter Malaysia (in 1979) for the purpose of the suit. He pleads that he was ignorant of the alleged wrongful act of the defendant.

He seeks a declaration that the said land forms part of the estate of his father Lee Chan and he wants, *inter alia,* an account of all the moneys received by the defendant or by any person on behalf of the estate of the defendant's father in respect of the land.

The defendant denies the allegation of fraud. He states that his father Lee Teow Kee was known as "Lee Yeak" and "Lee Aik" and the said property was his father's and that it was properly included in the list of the assets of his estate. The defendant pleads in the alternative that the plaintiff's cause of action is time-barred by virtue of the Limitation Act 1953.

Identity

I shall deal with the allegation of fraud later. For the moment there is need to deal with the main factual issue in this case, whether the name "Lee Yeak" as appears in the two memoranda of transfer executed (shown at PBD 20 and 22 respectively) is the alias of Lee Chan or of Lee Teow Kee.

The plaintiff was a child of six years old when his father, Lee Chan, died. He had to rely, *inter alia*, on the evidence of PW2, Lim Thian Soon, the son-in-law of Lee Chan, that Lee Chan was also known as "Lee Aik." PW2, however, said that he had heard from his mother-in-law, Goh Ching, that his father-in-law had that alias. PW2 admitted that at the time of his marriage his father-in-law had already passed away. And Goh Ching his mother-in-law naturally was not available as a witness as she had passed away, according to the plaintiff, on November 9, 1973. The evidence therefore of PW2 that Lee Chan was also known as "Lee Aik" is hearsay and accordingly I disregard the evidence. The plaintiff next relied on the inscription on his father's tombstone in Chinese characters which read "Lee Jit Chan alias Lee Chin Aik." It has to be pointed out that counsel for the defendant withdrew an allegation that he had made earlier, and before physical inspection of the said tombstone, that the tombstone was erected in 1979 and I take it that he is not disputing that the tombstone was erected before the question in dispute was raised and before litigation was commenced on the dispute. Although the tombstone was erected *ante litem motam* the question still arises whether the inscription relating to the alias of Lee Chan on the tombstone is admissible.

The inscription (translated from Chinese characters) reads –

"Name of deceased father: Lee Jit Chan alias Lee Chin Aik (Yeak).

Date of Death: Year 1931

Sons: (1) Teow Kee (2) Kim Leng (3) Kim Luan (4) Kim Toon."

The question is whether the statement relating to the alias is a statement of a relevant fact relating to "the existence of any relationship by blood, marriage or adoption between deceased persons" within the meaning of section 32(f) of the Evidence Act 1950. To my mind the inscription does show the father-son relationship of two deceased persons and a relevant fact is that the father whose name was Lee Jit Chan was also known as "Lee Chin Aik." I therefore hold that the inscription on the tombstone relating to the alias is admissible.

But it only shows that Lee Chan had an alias of "Lee Chin Aik" not "Lee Aik."

The plaintiff also relied on a statutory declaration made by Goh Ching, his mother, where Goh Ching swore that the name of her husband was Lee Aik alias Lee Chan and where she listed the names of her three children including the name of her adopted son Lee Teow Kee. Even if it is considered that the statutory declaration of Goh Ching may be relevant in the context of paragraph (e) of section 32, nevertheless the statement was made after the question in dispute, whether Lee Chan or Lee Teow Kee was known as Lee Aik, was raised, quite unlike the situation in *Chuah Hooi Gnoh Neoh* v. *Khaw Sim Bee*[1] where an affidavit made before the issue arose was held to be admissible. I hold the statutory declaration of Goh Ching irrelevant and inadmissible.

We now come to the two memoranda of transfer executed on March 15, 1924. The plaintiff says that going by Teow Kee's birth date shown on his tombstone – shown as July 1, 1912 – Lee Teow Kee on the date of execution of the memoranda was only 12 years old, a minor. The transfer could not have been made to a minor. Ergo the transfer must have been made to the plaintiff's father, Lee Chan, and it was made in his father's other name, Lee Aik.

I shall advert to this aspect of the evidence after I have examined the evidence adduced by the defendant that his father was known as "Lee Aik." The defendant testified that his father was known as Lee Teow Kee alias Lee Aik. And I have no reason to disbelieve him.

He said his father died in an accident on September 29, 1952 and that he applied for letters of administration in respect of the father's estate. He included the land under dispute as among his father's assets. He found the title to the disputed land in his father's house.

He testified under cross-examination that he saw a tombstone on his father's grave for the first time in 1980 and before that there had been only a wooden plaque at the grave; he said the tombstone could have been erected by his step-mother who left the family three years after his father had passed away. There is no reason to disbelieve this aspect of his evidence. Although the inscription on the tombstone does not contain any reference to "Lee Aik" as an alias of the deceased father of the defendant, I do not think one can read more into it that therefore Teow Kee did not have the alias of Lee Aik.

There were several documents DBD1, DBD11, DBD15 which were agreed documents and which

both parties freely referred to. The citizenship certificate of Lee Teow Kee (DBD1) shows that he had an alias of "Lee Yik." Counsel for the plaintiff characterises this entry as inconclusive. But it will be remembered that the plaintiff in his pleading does not allege fraud on the part of Lee Teow Kee in respect of the disputed property. Why then would Lee Teow Kee have claimed an alias of Lee Aik in the citizenship certificate? Why too would he state his alias as "Lee Yik" in his application to the Registrar of Business in 1940 (DBD11) for the registration of particulars in respect of "Seng Aik Sawmill, Mentakab" if that was not his alias. At the second page of the application the alias "Lee Yik" is given and Lee Teow Kee confirmed the accuracy of the statements made in the form in the name of "Lee Teow Kee alias Lee Yik." Previous to this application on August 15, 1940 he had also made an application (DBD15) to register particulars in respect of "Lee Chan Estate" and there too he gave his alias as "Lee Yik" and verified the statements in the form in the name of "Lee Teow Kee alias Lee Yik." I have no doubt that Lee Teow Kee was also known as "Lee Yik."

But was Lee Teow Kee known as "Lee Yik" or "Lee Yeak" in 1924 when Goh Ching transferred the property to "Lee Yeak?" The plaintiff points out that the tombstone of Lee Teow Kee shows that he was born in 1912 and that therefore he was 12 in 1924. I have, however, my reservations on the worth of that inscription as it is not clear who put the inscription there; the defendant had said it could have been his step-mother who put up the tombstone and that he only saw the tombstone there in 1980 and before that there was only a plaque at the grave. On the other hand in both the forms filed by Lee Teow Kee with the Registrar of Business in 1940, previously referred above (DBD11 and DBD15), Lee Teow Kee had put down his age then as 35 meaning he was born in 1905, in which case he was 19 in 1924.

Although before the coming into force of the Age of Majority Enactment (Cap. 68) in the Federated Malay States on January 1, 1933 there was no written law in regard to the age of majority in the F.M.S. it was held in 1919 by the Supreme Court of the F.M.S. in *Yap Tham Thai* v. *Low Hup Neo*,[2] that the age of majority, except for the purpose of the Probate and Administration Enactment (which had a provision defining the meaning of "minor"), was 21. Going on this case the argument is that therefore, since Teow Kee was only 19 in 1924 he could not have been the transferee of the two lots of land which were the subject matter of the memoranda. That is of course on the assumption that the declaration of Teow Kee that he was 35 in 1940, although not conclusive in the absence of his birth certificate or other cogent evidence on the matter, may amount to some evidence that he was a minor in 1924. However, I am not prepared to go so far as to say that the transfer was not made to him even assuming he was a minor. To say that the transfer could not be made to him is quite different from saying that if there was a transfer the transfer was invalid because it was to a minor. It will be noted that in the memorandum of transfer executed under the F.M.S. Land Enactment (see *e.g.* PBD20 and 22) there was no requirement for the witness attesting the signature of the transferor or transferee to attest that the person executing the memorandum had acknowledged to him that he was of full age unlike what is required under section 211 read with Form 13B of the National Land Code. In the circumstances I am not prepared to accept as a fact that the transfer could not have been made to Lee Teow Kee as "Lee Yeak" although he could have been a minor. I am also not prepared to accept that it was in fact transferred to Lee Chan as there is no evidence that he was known as "Lee Aik" or "Lee Yeak"; as I had stated earlier, while Lee Chan was known as "Lee Chin Aik" there is no evidence that he had an alias of "Lee Aik" or "Lee Yeak" nor is there any evidence that, except for the self-serving evidence of the plaintiff, that "Lee Aik" or "Lee Yeak" is a contraction of the name "Lee Chin Aik." Added to all these is the unexplained and surely strange behaviour of Goh Ching, the transferor of the two lots of land, if indeed she transferred the properties to her husband, not to her son. She co-administered the estate of her deceased husband, Lee Chan, and yet nowhere in the lists of assets was the disputed property mentioned nor did she do anything to indicate that the property was wrongly excluded from Lee Chan's estate. Considering all the evidence before me I cannot say that on a balance of probabilities the plaintiff has shown that the disputed property belonged to his father.

I do have to note in this judgment that the plaintiff was asked to compare the handwriting of the signatures in Chinese characters appearing in the memoranda of transfer relating to the land in dispute, as to whether they were Lee Chan's or Lee Teow Kee's handwriting, with the handwriting of signatures admitted to be those of Lee Chan and Lee Teow Kee in other documents. Since there is no evidence that the plaintiff was acquainted with

the handwriting of either Lee Chan or Lee Teow Kee, his views are not relevant having regard to section 47 of the Evidence Act. However, section 73(1) of the Evidence Act provides for the comparison of a signature purporting to be written by a person with others admitted or proved to the satisfaction of the Court. The comparison can be made by a witness or by a court. To my mind, however, the views of the plaintiff who made the comparison are on his own admission inconclusive and I disregard them. I myself cannot make a direct comparison of the signatures being quite unfamiliar with the Chinese script. I would have thought a handwriting expert should have been called to assist the court on the matter under section 45 of the Act.

One other matter before passing on to the allegation of fraud. The defendant was asked several questions concerning Chinese usages relating to the inscription of family and generation names on tombstones but no evidence was adduced to show that the defendant had special means of knowledge on the matter and consequently I reject the evidence as to these usages as not being relevant bearing in mind section 49 of the Evidence Act 1950.

Fraud

Fraud is pleaded. But what is the nature of the fraud? The plaintiff avers that his father was known as "Lee Yeak" or "Lee Aik." And that when the defendant applied in 1953 for letters of administration in respect of his father's estate he stated in his Petition that his father, Lee Teow Kee, was also known as "Lee Yeak" or "Lee Aik." And the defendant included the disputed land, which was registered in the name of "Lee Yeak," in the list of assets of the estate of Lee Teow Kee. And that apparently constitutes fraud.

Order 18 rule 12, R.H.C., governs the pleadings in this case although the pleadings were filed under the old R.S.C. 1957 (see Order 1, rule 2(1)) and the rule is that particulars have to be given of the fraud pleaded. In this case, however, there is merely a general allegation of fraud and the pleadings stand mute as to the circumstances relied upon as constituting the alleged fraud. A general allegation of fraud is insufficient even to amount to an averment of fraud of which any Court ought to take notice: *Wallinford* v. *Mutual Society*.[3]

In this case it is not even pleaded at the barest minimum nor are there any particulars showing that the defendant knew that the plaintiff's father was known as Lee Aik and that defendant's father was not known as Lee Aik and that the defendant was aware he was not. Or that the defendant knew the property belonged to his grandfather so that at least an inference could be drawn that he fraudulently or dishonestly included the disputed property in the assets of his own father's estate. This lack of inclusion of the circumstances constituting the alleged fraud makes it difficult for the Court to see what the issues are or to sift the evidence and to decide what the plaintiff wants the Court to conclude. In fact in regard to the evidence, the defendant was not even cross-examined as to whether he knew the land did not belong to the defendant's father. The Court was merely landed with the assertion that the plaintiff's father was known as "Lee Aik" and since the property was transferred to Lee Aik in 1924, therefore the property was not the property of the defendant's father. When asked as to how the defendant was to know the alias of Lee Chan the plaintiff replied to this question by his counsel that he did not know. The plaintiff implied in his evidence that the defendant's father could not have been known as "Lee Yeak" but he was not categorical that he did not have the alias. Thus not only was there an absence in the particularity of the circumstances in the pleadings constituting fraud, there was a general vagueness in the evidence relating to the fraud which allegedly took place. And the law is that he who alleges fraud must clearly and distinctly prove it.

I would like to touch on another aspect of the evidence. The plaintiff gave evidence that he had negotiations with the defendant in Singapore in 1977 over land matters. This the defendant did not deny. The plaintiff said, "At that time I realised my father Lee Aik has *(sic)* become the defendant's father." The defendant, however, stated that the discussion was on other land matters. Under cross-examination the plaintiff confirmed that it was in 1977 that he had first heard about it. Under further cross-examination he, however, backtracked and said he did know about the dispute as early as 1973 but he did not have documentary evidence like the Petition relating to Lee Chan's estate then. But in 1973, on his admission (although paragraph 11 of the Statement of Claim gives the impression that he returned to Malaysia only in 1979), he was in Malaysia and had heard about the dispute over the land. When confronted with a letter that he had written to the defendant in 1973 (DIT) he "roughly agreed", he said, that he had already knowledge of the dispute. But the plaintiff distinc-

tly states in the letter to the defendant, "You use unethical ways and means of passing off "Lee Aik" as "Lee Teow Kee" and transfer the whole sawmill." But this sentence was in reference to several properties belonging to Lee Chan and allegedly not distributed to the rightful beneficiaries.

My distinct impression is that the plaintiff genuinely felt there had been fraud practised by the defendant and he wanted to tailor his evidence to suit his case. My other distinct impression is that there was a genuine dispute between the plaintiff and the defendant over several lots of land which included the subject matter of this suit. It may well have been that some properties of Lee Chan have not been distributed to all the rightful beneficiaries. But that is not in issue before me – that is a different matter altogether from the present dispute in this case. The court cannot act on conjectures.

It is settled law that a higher standard of proof is required where fraud is alleged than that required for proving ordinary matters in a civil action. (See *Bater* v. *Bater,*[4] *Netherlands Trading Society* v. *Koh Kim Guan.*[5]) I can see no proof at all, let alone a higher standard of proof, in this case where fraud has been alleged.

In view of my finding that no fraud has been proved in this case and that there is no proof that the disputed land belonged to Lee Chan, the plaintiff's father, it is not necessary for me to go into the issue of limitation or any of the other matters in the pleadings. I accordingly dismiss the plaintiff's claim with costs.

Claim dismissed.

Solicitors: *Shook Lin & Bok; S.M. Yeong & Co.*

LIM KIAP KHEE v. PUBLIC PROSECUTOR

[O.Cr.J. (Zakaria Yatim J.) October 30, 1987]

[Kuala Lumpur – Federal Territory Miscellaneous Application No. Cr. 54-28-87]

Criminal Procedure – Bail – Non-bailable offence – Bail at discretion of court – Gravity of crime – Conditions of bail – Whether passport can be impounded – Criminal Procedure Code (F.M.S. Cap. 6) s.388.

Passport – Impounding of – Whether a condition of bail – Whether authorised by law – Criminal Procedure Code (F.M.S. Cap. 6), s.388.

In this case the applicant had been charged in the Sessions Court with two charges of criminal breach of trust punishable under section 409 of the Penal Code. The applicant claimed trial and the court fixed the date of hearing in October 1988. After hearing the parties, the learned Sessions judge fixed bail at $300,000.00 in two sureties and ordered the passports of the applicant to be impounded. Subsequently on the application of counsel for the applicant, the restricted passport of the applicant was ordered to be released to him. His international passport, however, remained impounded. The applicant applied for his international passport to be released to him.

Held: (1) since the applicant was charged with a non-bailable offence, bail is at the discretion of the court and in exercising its discretion the court must consider the gravity of the offence;

(2) in non-bailable offences, the court has an absolute discretion under section 388 of the Criminal Procedure Code whether to allow bail or to refuse bail except in cases punishable with death or imprisonment for life. In granting bail, the court may, in addition to stating the amount of bail and the number of sureties, impose reasonable conditions, including a condition requiring the accused person to surrender his passport. When the court lays down the conditions for bail, it is left to the accused whether to comply with it or not. If, for example, he does not want to surrender his passport then he opts to remain in custody;

(3) if the court decides that one of the conditions of bail is to require the accused to surrender his passport, it is immaterial whether the accused is a citizen of this country or a foreigner or whether he is holding a Malaysian passport or a passport issued by a foreign government;

(4) in this case, the Sessions Court ordered that the passport be impounded. The order was certainly not one of the conditions of bail. Therefore the order made by the court in respect of the passport did not fall within the scope of section 388 of the Criminal Procedure Code;

(5) in the absence of any law empowering the court to impound the applicant's passport, the order made by the learned Sessions judge was not a valid order. The order must therefore be set aside.

Cases referred to:

(1) *Public Prosecutor* v. *Mat Zain* [1948-49] M.L.J. Supp. 147.
(2) *Re K.S. Menon* [1946] M.L.J. 49.
(3) *R.* v. *Genda Singh & Ors.* A.I.R. 1950 All. 525.
(4) *In re Saradamma & Ors.* A.I.R. 1965 A.P. 444.